80-976

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

No._____

THOMAS LEROY SIRCY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To United States Court of Appeals
for the Sixth Circuit

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To the United States Court of Appeals
For the Sixth Circuit.

QUESTIONS PRESENTED.

1. Was Petitioner, a convicted felon, properly convicted of violating Title 18, Appendix, United States Code, Section 1202 (a) (1) solely upon evidence that an FBI agent, calling at Petitioner's home on business unconnected with this case, observed Petitioner in bed, and a pistol, belonging to Petitioner's wife, lying on a dresser several feet away from Petitioner?

2. Was Petitioner entitled to a jury instruction to the effect that "mere propinquity" to a forbidden object is not sufficient basis upon which to convict one of possession of that object?

3. May Petitioner, forbidden by law to possess any firearm, lawfully occupy a household in which another member lawfully possesses a firearm?

LIST OF PARTIES TO THE PROCEEDING.

The parties to this proceeding are the Petitioner, Thomas Leroy Sircy, and the Respondent, United States of America.

TABLE OF CONTENTS.

Questions Presented for Review 1
List of All Parties to the Proceeding 2
Table of Contents 3
Table of Authorities 3
Reference to Orders Below 4
Concise Statement of Grounds for Jurisdiction 4
Constitutional Provisions and Statutes 4
Concise Statement of the Case 4
Argument 5
Reasons for Granting the Writ 5
I. The Sufficiency of the Evidence 6
II. The "Proximity Instruction" 14
III. The Problem of Other Members of the Household. 17
Summary 19
Conclusion 21
Appendices:
"A": Orders Below 22
"B": Constitutional and Statutory Provisions. . . . 25
"C": Trial Court's Jury Charge on Possession . . . 26

TABLE OF AUTHORITIES.

Jackson v. Virginia __ US __, 99 S. Ct. 2781 (1979) . . . 5
Thompson v. City of Louisville, 363 US 199 5
USA v. Craven, 478 F 2d 1329 (6th Cir., 1973) 6
USA v. Holland, 445 F 2d 701 (D.C. Cir., 1971) 19
USA v. Manning, 618 F 2d 45 (8th Cir. 1980) 5

OPINIONS BELOW

This case was presented to the United States Court of Appeals for the Sixth Circuit from a judgment of conviction had in the United States District Court for the Middle District of Tennessee. The Court of Appeals entered an order affirming the conviction on August 8, 1980, and an order denying Petitioner's petition for rehearing on October 14, 1980. So far as Petitioner can determine, neither of these orders is reported. Both are set out in APPENDIX A of this petition.

JURISDICTION.

As stated above, the order of the Court of Appeals affirming Petitioner's conviction was entered on August 8, 1980. The order denying Petitioner's Petition for rehearing was entered on October 14, 1980. The jurisdiction of this Court is invoked under 28 USC 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS.

This case involves Amendment V to the Constitution of the United States and Title 18, Appendix, USC Section 1202 (a) (1), both of which are set out in APPENDIX B to this petition.

CONCISE STATEMENT OF THE CASE.

The Petitioner at all relevant times was a person who had been convicted of a felony. While he was serving a penitentiary sentence, his wife acquired firearms including the one which is the basis of this prosecution. This gun had previously been seized by federal agents, but later returned to Petitioner's wife.

After the adoption of the gun control act under which Petitioner was prosecuted, he divested himself of all firearms in his possession. He took especial pains to ensure that the gun in question was known to all authorities, together with the information that it belonged to his wife and not to him.

Petitioner was charged with the present offense upon the statement of an FBI agent that when he, the agent, went to Petitioner's home on an unrelated errand, he observed the gun on a dresser in the bedroom occupied by Petitioner and his wife, some six feet away from the Petitioner, who was lying in bed. This is the only testimony suggesting possession of the firearm by the Petitioner.

Petitioner testified, without contradiction, that he had never exercised control over his wife's firearms, and had never "intended" to possess them or any of them.

Petitioner was found guilty by the jury and sentenced to two years imprisonment.

ARGUMENT.

REASONS FOR GRANTING THE WRIT

While realizing that the Supreme Court does not sit for the correction of errors, Petitioner nevertheless contends that there are several cogent reasons why the writ of certiorari should be granted in this case, viz.:

1. There was no evidence of any intent on Petitioner's part to possess the firearm, nor any circumstances from which such intent, a necessary element of the "constructive possession" relied upon by the government, could reasonably be inferred. The result below is therefore in conflict with the holdings of this court in Thompson v. City of Louisville, 363 U.S. 199 (19) and Jackson v. Virginia, __ U.S. __, 99 S. Ct. 2781 (1979).

2. This decision of the Sixth Circuit is in sharp conflict with that of the Eighth Circuit in USA v. Manning, 618 F2d 45 (8th Cir. 1980) dealing with the right of the defendant to jury instructions embodying his theory of defense. It is highly desirable that this Court resolve this conflict and settle the issue properly. This Petitioner was convicted on "propinquity" alone.

3. The law of "constructive possession" generally is in an intolerable state of confusion and sorely in need of clarification, which only this Court has the authority and ability to provide. This case presents an admirable vehicle for this clarification.

I. THE SUFFICIENCY OF THE EVIDENCE.

The physical aspects of the facts of the present case are undisputed, and are set out in the testimony of the Government witness, the FBI agent Dr. Don C. Birdwell, printed below, and in the testimony of the Petitioner, relevant portions of which also appear below. The trial court and the Court of Appeals found this testimony sufficient to sustain the conviction. The Court of Appeals cited only one case in support of its decision, viz., United States v. Craven, 478 F 2d 1329 (6th Cir. 1973), and stated that "The facts in Craven are almost identical to the facts in the instant case." The court's recital of the facts in Craven are as follows, beginning at 478 F 2d 1332:

> When the defendant surrendered to the authorities on May 4, 1971, he was accompanied by his attorney. Agent Ginetz of the Bureau of Narcotics and Dangerous Drugs read Craven the Miranda warnings and the defendant was processed through the customary booking procedures. While these administrative steps were being taken, Agent Ginetz and the defendant engaged in a conversation away from Craven's attorney. In response to the agent's inquiry about the guns the defendant stated that he was a gun collector. When asked about the machine guns the defendant said that he had had the machine guns for some time. While the defendant was being fingerprinted another agent inquired about the firearms and Craven told him that he had been collecting guns and had moved them to the Rustic Lane

house from another location. (Emphasis supplied.)

And at page 1333:

Although possession of the residence is insufficent to establish possession of all the contents of the house, the government's evidence went much further.

And at page 1334:

...(O)nly eight days prior to the date the defendant was charged with possessing the weapon, he was seen in the master bedroom of the residence sitting in bed with a revolver which looked like the firearm named in Count IV lying on the bed. Further, the defendant's own admissions concerning the weapons found during the raid were sufficiently broad to permit the jury reasonably to conclude that this revolver was encompassed by the statements. (emphasis supplied.)

This Petitioner submits that the matters proved in the two cases are quite dramatically different, particularly upon the very issue which is crucial and controlling, that is, the issue of Defendant's intent to possess the gun. The testimony of the Petitioner relating to his intent to possess the gun begins at page 83 of the trial transcript, and is as follows:

When I came home (from prison) in 1973, I was concerned about the possibility of prosecution under the very thing I'm here for today.

At that time the government's prosecution of convicted felons for possession of firearms had stepped up, and I had met several people (in prison) in Springfield, Missouri, who had been convicted for possession of firearms after a conviction of a felony, and I was concerned about this, about the two guns my wife had in the home.

When I came home, the first thing I did was call

the ATF office here in Nashville.

Q. What does ATF stand for? (84)

A. Alcohol and Firearms Division Law Enforcement—I'm not sure exactly what the initials are.

I talked to a Mr. Stone or Stoner. I'm not certain. This has been some six years ago. He was a agent in the Nashville office.

I told him who I was and explained the circumstances to him, that my wife had two pistols in the house, that I was a convicted felon and what would the Federal agency's position be on this.

Mr. Stone or Stoner—I'm not certain of the name; I have never met the man: I have only talked to him over the phone.

BY MR. WINDSOR: We object to the hearsay, Your Honor.

BY THE COURT: I sustain the objection. You can't tell what he told you. Go on to something else.

*****

BY MR. GALBREATH: (Continuing)

Q. Well, acting on what you were advised, what did you do yourself?

A. I went down to the Sheriff of Robertson County, who was Herbert Dodd at that time and the chief law enforcement (85) officer, and I explained the situation to him.

BY THE COURT: I sustain the objection to anything he said. Now, go on to something else.

BY MR. GALBREATH: (Continuing)

Q. What did you do to further your goal of divorcing yourself from the possession of these firmarms?

A. I suggested to my wife—well, on advice of this

official, I suggested to my wife that she go to Woodard Hardware and get two applications for the possession of two hand guns. There is no registration for hand guns. This serves as the only form of registration, as far as I know that is demanded of hand guns in this country.

My wife filled these out and carried them and the two guns to the sheriff's office.

Q. Were you here in Tennessee at that time or.....

A. Oh, no, I was there at home, and it was at my suggestion that she did this, because I was concerned about the guns and myself being in the house.

And further, beginning at page 88 of the Transcript:

Q. (BY MR. GALBREATH) Well, of course the ultimate fact is to determine if whether or not you were in possession of these weapons. Have you ever been in possession, guilty or otherwise.....

A. (BY THE DEFENDANT) No, realizing the danger of the guns, I have been especially careful not to ever have the guns in my personal possession, never handle them and have nothing to do with them whatsoever.

Prior to 1968 before the Gun Control Act was passed, I was an avid gun collector.

As soon as the law was passed that prohibited an ex-felon from possessing a firearm, I immediately sold what I had and have been particularly careful since then not to handle any firearms, because I am aware of the danger.

*****

(P. 89) BY MR. GALBREATH (Continuing) This might be of concern to the jury. Knowing your status as a convicted felon, why did you permit Mrs.

Sircy to keep firearms in the house?

A. My wife and I are divorced. We have—now are in the process of effecting a reconciliation.

My wife has many possessions that are not mine and that I exercise no control over, just as I have many that are not hers.

I couldn't very well tell her not to keep something that is hers by personal right and by right of law, especially if it was a gift of my father.

Q. Were you concerned yourself for her safety?

A. Oh, yes, I'm concerned about her safety, of course.

It is incontroverted, and is corroborated by the testimony of his wife, Mrs. Mabel Sircy. It is the only testimony bearing upon Petitioner's state of mind, and is exactly opposite to that in Craven.

Petitioner did not make any statement that he was a gun collector, but on the contrary, testified that he had been a gun collector, and that upon the passage of the Gun Control Act, he had immediately dispossessed himself of all his guns, and further that he encouraged his wife to register her own guns in order to make it known to the authorities that she possessed them and that they were hers; that he was aware of and concerned about his exposure arising from his living in the house with his wife who owned the guns, and therefore took all the steps he could think of to assure that the presence and ownership of the guns were known to the authorities.

This testimony of the Defendant was corroborated by that of his wife, Mrs. Mabel Sircy, which appears in the Transcript at pages 46 through 67, and it is uncontroverted.

It thus is apparent that the difference between Craven and Sircy is substantial and determinative. The Craven

court recognized that possession of the residence was insufficient to establish possession of all the contents, but found that Craven himself had provided the necessary evidence of his intent to possess the weapons by his statements to the agents that he was then a gun collector, that he had had the machine guns for some time, and that he had transported the guns to the place where they were found from another location. There is no such evidence in the present case. The testimony of the only person or persons who actually knew Sircy's "intent" relative to the gun, namely, the Defendant himself and his wife, was to the effect that he had no intent to possess the gun or exercise any control over it, but on the contrary, went to some lengths to disassociate himself from the weapons which his wife lawfully possessed. When the act of Congress under which the present prosecution was brought became effective in 1968, the Defendant, who had previously been an "avid" gun collector, immediately disposed of all his guns and since then had been especially careful not to have guns in his personal possession, handle them, or have anything to do with them whatever. This testimony, wholly uncontradicted, is also eminently reasonable, and describes conduct on the part of the Defendant which is wholly consistent with what might be expected of a man in his position, considering his own circumstances and those of Mrs. Sircy.

The Court of Appeals states in its affirming order: "In addition, viewing the evidence in the light most favorable to the government, the jury could have disbelieved Sircy's testimony since he pled guilty to armed robbery (sic) with a handgun." It is indeed possible and, in fact, apparent that the jury disbelieved Sircy's testimony concerning his intent, although there appears no rational basis in the record for it to have done so, or for its being allowed as a matter of law to do so. The inherent probability of Sircy's testimony leaps to the eye.

The proof of his prior conviction of a felony, as the trial judge correctly instructed the jury (Transcript p. 146) does not constitute substantive proof of his guilt in this case, but is admissible only for the purposes of impeachment. The fact of Sircy's prior conviction of the felony needed as an element of the offense charged in the present case had been established by stipulation. On cross examination, Sircy acknowledged that two years after the effective date of the Gun Control Act, he pleaded guilty to "attempted armed robbery" (not armed robbery, as the Court of Appeals inadvertently stated in its order). This plea is not inconsistent with Defendant's testimony to the effect that he had not possessed or handled firearms since the effective date of the act. One may be guilty of armed robbery in many modes and ways with out handling a weapon; as a lookout, a getaway driver, an unarmed participant whose job is to carry the booty, etc. ad. lib.

Assuming, nevertheless, that the testimony of the Petitioner was disbelieved by the jury and entirely eliminated from the case, there would still be a complete void as to the government's essential proof as to the Petitioner's intent. The government asks the courts to supply this proof on the basis of the mere proximity of the weapon to the Defendant, as appears from the testimony of Mr. Don C. Birdwell, a former FBI agent who had participated in the arrest of the Defendant, as appears in the Transcript beginning at page 40:

> BY MR. GALBREATH: (Continuing)
>
> Q. Now, as a matter of pure fact, have you ever seen, observed or even heard, hearsay or any other way, about Mr. Sircy being in possession of either one of these firearms?
>
> BY THE COURT: Don't answer on the hearsay.
>
> BY MR. GALBREATH: (Continuing)

Q. Well, have you yourself any knowledge that he has ever been in possession of either of these firearms?

A. Yes, sir.

Q. All right, sir.....

A. They were in the bedroom when I arrested him on November 18, 1978.

*****

Q. Well, the fact that they were in the room, that's the basis for your opinion that he was in possession of them?

A. Yes, sir.

*****

(P. 41 of Transcript)
Q. You never knew of any physical possession?

A. You mean having them in his hand?

Q. Yes, sir.

A. No, sir, I didn't see them in his hand.

Defining "constructive possession" cannot, of course, supply missing proof of the element of intent to exercise dominion and control. One may search this record in vain for any scintilla of proof to rebut Petitioner's defense that he was "merely present" and did not intend to exercise, let alone actually exercise, dominion and control over these weapons; indeed one searches in vain for any scintilla of proof in the government's case in chief which would require such defense to be made. It is obviously possible for the Petitioner to have been in the same room with the pistol without "possessing" it, and to require him to prove non-possession in the circumstances of this case, where the only evidence tending to establish the essential intent was testimony that the

Petitioner and the weapon were found in the same room, would be improperly to shift the burden of proof to the Petitioner, and further to require him to prove a negative proposition (that is, that the essential intent did not exist), which he obviously could only do by his own testimony. The judgment in this case is based firmly on the proposition that proof of intent, needed to establish "constructive possession," can be supplied by proof of mere proximity of the Petitioner to the gun; and this proposition is contrary to the applicable law.

This brings us naturally and logically to consideration of the second proposition which Petitioner would urge.

II. THE "MERE PROXIMITY" INSTRUCTION

At the trial of this cause, the Defendant made timely and proper request for jury instructions as follows:

Def's Special Request # 1

> Proximity, even close proximity, to the item possessed does not in and of itself prove possession but is a factor that may be, along with other evidence, be taken into consideration by the jury.

Def's Special Request # 2

> A member of a family may exercise possession independent and separate from that of other members of the household.

Each of these requests was "Declined as covered" (in the general charge) by the trial judge. At the conclusion of the general charge, Petitioner renewed his requests and entered timely objections to the trial judge's refusal to deliver the special charges.

On April 21, 1980, the United States Court of Appeals for the Eighth Circuit decided the case of United States v. Manning, 618 F 2d 45 (8th Cir. 1980.), which dealt

with a very similar request for instructions. The request was denied by the trial court, and the Court of Appeals reversed. The most apposite and cogent portions of the Manning opinion are as follows:

> The single issue on appeal is the allegation that the district court erred in refusing defendant's proposed instruction regarding possession of the gun. The instructions adopted by the district court included the government's possession instruction, which stated that conviction could be based on either actual or constructive possession:
>
> > The law recognizes two kinds of possession: actual possession and constructive possession.
> >
> > A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it.
> >
> > A person who, although not in actual possession, knowingly has both the power and the intention, at a given time, to exercise dominion and control over a thing, either directly or through another person or persons, is then in constructive possession.
> >
> > If you should find beyond a reasonable doubt, from the evidence in the case, that at the time and place of the alleged offense the defendant had actual or constructive possession of the shotgun described in the indictment, then you may find that such shotgun was in the possession of, within the meaning of the word 'possession' as used in these instructions.
>
> The district court refused Manning's possession instruction, which would have expressly precluded conviction for mere presence on the scene and association with illegal possessors:
>
> > Constructive possession requires that a per-

son knowingly have the power or the intention at a given time to exercise dominion and control over an object either directly or through others.

Mere presence on the scene plus association with illegal possessors is not enough to support a conviction for illegal possession of an unregistered firearm unless you find beyond reasonable doubt that the defendant was a participant and not a knowing spectator.

Manning argues that, in refusing this instruction, the court ignored his defense that he was at the scene as an unwitting backseat passenger. He accurately notes that mere presence or proximity to an unregistered weapon is an insufficient basis for conviction, United States v. Birmley, 529 f. 2d 103 (6th Cir. 1976); United States v. Gates, 491 F. 2d 720 (7th Cir. 1974), and that a defendant in a criminal case is entitled to a "theory of defense" or a "position" instruction if he makes a timely request for (48) such an instruction, if the request is supported by evidence and if it sets out a correct declaration of law. (Cites cases.) Here, Manning was entitled to an instruction submitting his theory of defense because he made a timely request for such an instruction, there was testimony to support the instruction and his requested instruction set forth an accurate declaration of the law.

*****

In the present case...the instructions given by the district court regarding constructive possession cannot be said to have covered the substance of Manning's "mere presence" defense. The court's instructions recommend conviction if the jury could find, beyond a reasonable doubt, that Manning was at the

scene with direct or indirect control of the weapon. These instructions appear to give credence to the police officers' version of events, without acknowledging Manning's defense that he was merely a backseat passenger." (Emphasis supplied.) 618 F. 2d at 47-48. (See p 18)

III. THE PROBLEM OF OTHER MEMBERS OF THE HOUSEHOLD

Perhaps the most compelling reason for the need for clarification of the law and repudiation by this court of the loose concept of "constructive possession" applied in this case by the Sixth Circuit lies in the grotesque effects and penalties suffered by innocent parties who have every right to possess the articles, but can exercise that right only at the peril of those close and dear to them for whom possession is forbidden. Thus, while Mrs. Mabel Sircy had every right to possess the gun in her home, and while she felt it was necessary and desirable for her own protection, she is in effect compelled to choose between this legitimate safety measure and the company of her husband.

The son of the parties will never, so long as he resides in his parents' house, be able to own a shotgun or a hunting rifle or even a .22 target weapon without exposing his father to the danger of prosecution.

Under the rule of this case as it now stands, one lawfully possessed of prescription medicines containing regulated drugs could not keep the medicines in a medicine cabinet in a bathroom shared with other members of the household without exposing those innocent parties to the penalties of the criminal law.

These results and many similar ones are grotesque and unseemingly, and this Court now has a splendid opportunity to correct the situation, incidentally rendering justice to the Petitioner.

Petitioner contends that the dispositive principles in the Manning case and the present case are identical. The Court of Appeals for the Sixth Circuit in the present case, in its order denying the petition for rehearing,

APPENDIX A, page 22, infra, recognizes the validity and applicability of the rule in Manning, but finds that the charge in the present case meets the requirements of that rule. Petitioner urges that in so finding, the court below has misread or misunderstood either the Manning opinion or the charge in the present case.

The relevant portions of the court's general charge in the present case are set out in APPENDIX C, page 26, below. It will be seen that the charge in the present case is very much more favorable to the government than the charge in Manning, and that it was given not once but essentially three times. Petitioner contends that it is plain that under the rule of Manning he is entitled to a new trial, and asks that this Court grant the writ of certiorari in order to resolve this conflict between the circuits.

SUMMARY.

An excellent commentary on the deplorable state of the law of "construction possession" is found in the concurring opinion of Judge Tamm of the District of Columbia Circuit in U.S.A. v. Holland, 445 F 2d 701 (D.C. Cir. 1971) at page 703. Judge Tamm's remarks are so splendid that Petitioner concludes his petition for certiorari by setting them out in full:

TAMM, Circuit Judge (concurring):

Judicial decisions have at best established ill-defined guidelines as to the evidentiary requirements necessary to prove constructive possession. Especially in reported cases growing out of narcotics prosecutions the opinions are usually built upon involved and obscure reasoning which certainly suggests judicial subjectivity. The resulting confusion should convince those who read the cases that decisions in this area are made by a selective rather than a comprehensive application. *See* Annot., 91 A.L.R.2d 810 (1963). The rhetorical legerdemain compounded in this area of the law invokes abstractions which appear more designed to achieve a particular result in an individual case than to stabilize and formalize a workable index of objective standards. The more cases one reads on constructive possession the deeper is he plunged into a thicket of subjectivity. Successive cases enumerate a continuing re-interpretation which can only be described as judicial whimsy. To basic questions to which the an- (704) swer should be "Always", judicial hairsplitting settles for a wavering "Sometimes".

Confronted with a library of flexible abstractions, government and defense counsel alike must struggle, too often unsuccessfully, with a logically insoluble dilemma. The sum total of recorded cases can best

be described as symbiotic.[1] Both prosecutor and defendant's attorney present their cases with the unfortunate knowledge that the law of constructive possession is what we will say it is in our next opinion. It is illogical to believe that from the chaotic patchwork which flows *ex cathedra* there is created a stable and definable body of law. It is the confusion and doubt unavoidable in the thinking of lawyers, created by our meandering rulings, that results in the unfortunate waste of trial and appellate time which we have impossed upon ourselves.

The majority opinion accurately points out the affirmative conclusions which were not negated by the Government's proof and which require reversal of

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1. The usual approach to determination of the existence or presence of constructive possession is largely a matter of tone. To attempt to catalogue conflicting opinions would be tedious and perplexing. The lack of exactitude is illustrated by reference to the following cases:

   United States v. Vasquez, 429 F. 2d 615 (2d Cir. 1970); United States v. Febre, 425 F. 2d 107 (2d Cir. 1970); United States v. Lopez, 355 F.2d 250 (2d Cir. 1966); United States v. Carter, 320 F.2d 1 (2d Cir. 1963); Hallman v. United States, 115 U.S.App. D.C. 350, 320 F.2d 669 (1963); United States v. Douglas, 319 F.2d 526 (2d Cir. 1963); United States v. Ramis, 315 F.2d 437 (2d Cir. 1963); United States v. Jones, 308 F.2d 26 (2d Cir. 1962) *(en bane)*; Collis v. United States, 101 U.S. App. D.C..160, 247 F.2d 566 (1957); People v. Pippin, 16 App.Div.2d 635, 227 N.Y.S.2d 164 (1962); People v. Jackson, 23 Ill.2d 360, 178 N.E.2d 320 (1961); Crisman v. Commonwealth, 197 Va. 17, 87 S.E.2d 796 (1955).

   In approximately half of the cited cases constructive possession was found to exist. In the other half the court's finding was in the negative. It is not difficult to visualize a different court holding exactly the opposite in most of these cases. The affirmative and negative rulings are in such obvious conflict that for the practitioner the problems are difficult to understand and apparently for the courts impossible to master.

the present case. In so doing we make, to us, an acceptable disposition of the present case. Lawyers in future cases, concerned as to the issue of constructive possession, will still find most trial and appellate courts simultaneously looking in both directions.

No man should be convicted on the basis of a legal fiction.

CONCLUSION.

For the foregoing reasons, it is respectfully requested that this petition for the writ of Certiorari to the United States Court of Appeals for the Sixth Circuit be granted.

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APPENDIX A

No. 79-5288
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	ORDER
THOMAS LEROY SIRCY, Defendant-Appellant	)	

Before: MERRITT, KENNEDY and MARTIN, Circuit Judges.

In a jury trial defendant, Thomas Leroy Sircy, was convicted of violating 18 U.S.C. App. § 1202 (a) (1), the unlawful possession of a firearm by a convicted felon. Defendant was sentenced to 24 months which is the maximum sentence under the statute. Defendant's only assignment of error is that the government's proof was insufficient to establish his possession of the weapon.

At trial the facts were undisputed. On December 18, 1978, three FBI agents went to defendant's home to serve a warrant for his arrest. Defendant's wife met them at the door. The agents proceeded back to the bedroom where defendant was sleeping and arrested him.

The guns in question were found on the dresser near the bed where defendant was sleeping. They were the same guns that had been confiscated by the FBI in 1974 when defendant was arrested and pleaded guilty to another offense. The guns were returned to Mrs. Sircy, however, when the FBI traced both weapons and discovered they belonged to her.

Defendant asserts that there was no evidence to support the verdict and, therefore, the conviction cannot be sustained. He testified at trial that he never used or cleaned the guns and had no control over the guns whatsoever. Mrs. Sircy testified to the same effect.

In a 1973 decision this Court defined constructive possession as requiring the power and intention to exercise dominion and control either directly or through others and it may be proved by direct or circumstantial evidence. United States v. Craven, 478 F. 2d 1329 (6th Cir. 1973), cert. denied 414 U.S. 866 (1973, reh. denied 414 U.S. 1086 (1973). The facts in Craven are almost identical to the facts in the instant case. In addition, viewing the evidence in the light most favorable to the government, the jury could have disbelieved Sircy's testimony since he had earlier pled guilty to armed robbery with a handgun. We, therefore, hold that there was sufficient evidence from which the jury could find that defendant possessed the weapons in question.

Accordingly, the judgment of the District Court is affirmed.

ENTERED BY ORDER OF THE COURT

Signed

John A. Hehman, Clerk

No. 79-5288
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee	)
v.	) ORDER DENYING PETITION FOR REHEARING
THOMAS LEROY SIRCY, Defendant-Appellant	)

Before: MERRITT, KENNEDY and MARTIN, Circuit Judges.

The defendant-appellant has filed an articulate petition

for rehearing again arguing that the evidence of possession of the firearm in question in this case is insufficient. The Court ruled on this question in its initial order affirming the judgment of the District Court, and no new arguments are advanced. With respect to jury instructions on proximity of the defendant to the firearm in question, the defendant has advanced a new argument based upon the case of United States v. Manning, 618 F. 2d 45 (8th Cir. 1980). The Court has reviewed the Eighth Circuit opinion and the instruction which the District Court gave the jury in this case. The Court finds that the District Court in this case did, in fact, give the first paragraph of the Manning instruction set out at 618 F. 2d 47, but did not give the second paragraph of the Manning instruction which says in substance that mere presence on the scene plus association with illegal possessors is not alone sufficient to support a conviction for illegal possession of unregistered firearms. We believe that the failure to give such an instruction in this case did not affect the substantial rights of the defendant under Rule 52, Fed. R. Crim. P. The instruction of the District Court on the question of possession plus its instruction on the requirement that the defendant intend to possess the weapon was sufficient to advise the jury that "mere association" or "mere presence" is not alone sufficient to show intent to possess.

Accordingly, the petition to rehear is denied.

ENTERED BY ORDER OF THE COURT

Signed

_____

John A. Hehman, Clerk

United States Court of Appeals
For Sixth Circuit
No. 79-5288

UNITED STATES OF AMERICA
Plaintiff-Appellee

vs.

THOMAS LEROY SIRCY
Defendant-Appellant.

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

APPENDIX B

CONSTITUTION OF THE UNITED STATES

AMENDMENT 5

Criminal actions—Provisions concerning—Due process of law and just compensation clauses.— No person shall be held to answer for a capital, or otherwise infamous

crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 18, Appendix, United States:
§1202. Receipt, possession, or transportation of firearms Persons liable; penalties for violations

(a) Any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony...and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

APPENDIX C

The only element which has not been admitted and stipulated is whether the defendant possessed the firearm.

The law recognizes two kinds of possession, actual possession and constructive possession. A person who knowingly has direct physical control over a thing at a given time is then in actual possession of it.

A person who, although not in actual possession,

knowingly has the power and intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

The law recognizes also that possession may be sole or joint. If one person alone has active or constructive possession of a thing, possession is sole.

If two or more persons share actual or constructive possession of a thing, possession is joint.

You may find that the element of possession, as that term is used in these instructions, is present if you find beyond a reasonable doubt that the defendant had actual or constructive possession, either alone or jointly with others.

An act or failure to act is knowingly done if done voluntarily and intentionally and not because of mistake or accident or other innocent reason.

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Before the defendant can be convicted of a crime in this case, as I told you, the defendant must have possessed the firearm as previously defined.

One of the elements of possession involves intention. In other words, the defendant must have intended to possess the firearm.

To establish that specific intent the government must prove that the defendant knowingly intended to (150) possess the firearm.

An act or failure to act is knowingly done if done voluntarily and intentionally and not because of mistake or accident or other innocent reason.

Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operation of the human mind, but you may infer

the defendant's intent from the surrounding circumstances.

You may consider any statements made by the defendant and all of the facts and circumstances in evidence that indicate his state of mind.

It is ordinarily reasonable to infer that a person intended the natural and probably consequences of acts knowingly done or knowingly omitted.

The jury may but is not required to draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any intentional act or omission. Any such inference drawn is entitled to be considered by the jury in determining whether or not the government has proved beyond a reasonable doubt that the defendant possessed the required criminal intent.

As I said, it is entirely up to you to decide what facts to find from the evidence.

An act is knowingly done if done voluntarily (151) and intentionally and not because of mistake or accident or other innocent reason. An act is done willfully if done voluntarily and intentionally or with the specific intent to do something which the law forbids with said purpose to disobey or disregard the law.

Intent and motive should never be confused. Motive is what prompts a person to act or fail to act. Intent refers only to the state of mind with which the act is done or omitted.

BY THE COURT: Court will be in recess pending the return of the jury.

(SUBSEQUENTLY A NOTE WAS RECEIVED FROM THE JURY AND COURT RECONVENED IN THE PRESENCE OF THE JURY)

BY THE COURT: You want the charge on possession again. I'll give it to you, and I'll read it slowly. Some people tell me I read too rapidly.

There are two kinds of possession. They are actual possession and constructive possession; that's the two kinds.

A person who knowingly has direct physical control over a thing at a given time is then in actual possession of it.

A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

The law also recognizes that possession may be sole or joint, that is one person or more than one person. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.

You may find that the element of possession as that term is used in these instructions is present if you find beyond reasonable doubt that the defendant had actual or constructive possession, either alone or jointly with others.

An act or failure to act is knowingly done if done voluntarily and intentionally and not because of mistake or accident or other innocent reason.

Now, that's the law on possession. Did I read slowly enough?

Okay, now the other question was that you wanted

the intent instruction again.

The law requires an intent on the part of the defendant to possess the gun, that is either possess it actually or constructively, solely or jointly. Such intent may be determined from all the facts and circumstances surrounding the case.

Intent ordinarily may not be proved directly because there is no way of fathoming or scrutinizing the operation of the human mind; you can't cut it open and look at it.

But you may infer the defendant's intent from surrounding circumstances. You may consider any statements made by the defendant and all of the facts and circumstances admitted which indicate his state of mind.

It is ordinarily reasonable to infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. The jury may but is not required to draw the inference that the accused intended all the consequences that one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any intentional act or conscious omission.

Any such inference drawn is entitled to be considered by the jury in determining whether or not the government has proved beyond reasonable doubt that the defendant possessed the required criminal intent.

As I said, it is entirely up to you to decide what facts to find from the evidence.

Does that take care of it? Anything further?

All right, you may be excused to deliberate.

Court is adjourned. (159)

(THEREUPON COURT RECONVENED TO EXCUSE THE JURY UNTIL THE FOLLOWING MONDAY TO CONTINUE THEIR DELIBERATIONS)

BY A JUROR: Could you read the one on intent over one more time?

BY THE COURT: Yes, sir. It must be proved in this case that the defendant intended to possess the gun. Intent ordinarily may not be proved directly because there is no way of fathoming or scrutinizing the operation of the human mind, but you may infer the defendant's intent from surrounding circumstances. You may consider any statement made by the defendant and all of the facts and circumstances in evidence which indicate his state of mind.

It is ordinarily reasonable to infer that the person intends the natural consequences of acts knowingly done or knowingly omitted.

The jury may draw the inference that the accused intended all consequences which one standing in like circumstances and possessing like knowledge could reasonably have expected to result from any intentional act or conscious omission. Any such inference drawn—and I'll tell you you don't have to draw that inference; it's entirely up to the jury—any such inference drawn is entitled to be considered by the jury in determining whether or not the government has proved beyond a reasonable doubt that the defendant possessed the required criminal intent. (160)

(160) As I have said, it is entirely up to you to decide what the facts are from the evidence. It is not necessary that the defendant intended to violate the law; it is only necessary that he intended to possess a weapon.

Is that satisfactory?

All right, come back Monday morning at 9:00 o'clock.

Court will be adjourned.

(THEREUPON COURT WAS ADJOURNED)

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